TC06339

Appeal number: TC/2017/07087

INCOME TAX – individual tax return – penalties for late filing – whether giving notice under Section 8(1) TMA a pre-requisite for filing a tax return under Section 8(1)(a) – yes – if no such notice given can Schedule 55 apply – no – on the facts no notice given - appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

D J WOOD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
WILL SILSBY

Sitting in public in Cardiff on 4 December 2017

The Appellant in person.

Miss L Morgan, Officer of HM Revenue & Customs for the Respondents.

Introduction

1. The appellant appeals against late filing penalties under Schedule 55 Finance Act 2009 ("late filing penalties"), in a total amount of £3,400.

2. Details of the late filing penalties are set out below:

Tax Year	Penalty	Amount
2015/2016	Late filing penalty	£100.00

2014/2015	Late filing penalty	£100.00
	Daily penalties	£900.00
	6 months late filing penalty	£300.00
	12 months late filing penalty	£300.00
2013/2014	Late filing penalty	£100.00
	Daily penalties	£900.00
	6 months late payment penalty	£300.00
	12 months late payment penalty	£300.00
2010/2011	Late filing penalty	£100.00

Summary of the law

3. The law imposing late filing penalties is in Schedule 55 Finance Act 2009 and in particular paragraph 1, paragraph 3 (initial penalty of £100.00), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively).

4. Paragraph 1(1) of Schedule 55 states that:

> "a penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date".

5. The Table referred to is in paragraph 1(5). It specifies an income tax return as being a return under Section 8(1)(a) of the TMA.

6. Under Section 8(1):

> "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice.....".

7. HMRC must go through different procedural hoops to notify, properly, each type of late filing penalty. Most importantly, daily penalties cannot be imposed unless HMRC decide that such a penalty should be payable and also give notice to the taxpayer specifying the date from which the penalty is payable (paragraph 4(1)(c) of Schedule 55).

8. By contrast, there are no such qualifications for the initial penalty of £100 or the fixed or tax geared penalties after 6 and 12 months.

9. If the imposition of the penalties is procedurally correct, both the respondents and this Tribunal have power to cancel them, if they think that the appellant has a reasonable excuse; or reduce them if either HMRC consider that there are special circumstances, or that the Tribunal believes that HMRC's decision not to reduce for special circumstances is flawed.

10. The test of reasonable excuse is set out below. An insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control.

11. Special circumstances do not include the ability to pay.

12. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

13. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

14. Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

15. Under Section 115 TMA:

> "Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person..... at his usual or last known place of residence, or his place of business or employment....."

16. Under Section 7 of the Interpretation Act 1978:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is to be deemed to be effected by properly addressing, pre-paying

and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post"

Summary of the facts

17. We were provided with a bundle of documents. The appellant gave evidence in person. We found him to be an honest and reliable witness and we accept his oral evidence.

18. Following the hearing we sought further information from the appellant regarding the liquidation of the World's Greatest Pub Company Limited. The appellant was unable to provide any such additional information but did provide a copy of the tenancy agreement mentioned at [19.6)] below. HMRC provided commentary on this tenancy agreement.

19. From this evidence, we find the following facts:

    1) The appellant started his own business via a limited company called "The World's Greatest Pub Company Limited" (he was the sole shareholder) in 2008. About six months after he started, he employed an agent, a book-keeper, called "BB Brooks" to take care of the VAT, corporation tax and PAYE filings for the company, and the appellant's personal income tax returns.

    2) BB Brooks undertook these tasks for both the company and the appellant between 2008 and 2014.

    3) In 2014 the appellant realised that the business venture he was conducting through The World's Greatest Pub Company Limited was failing, and it went into liquidation.

    4) HMRC's employment records show that, as far as HMRC were concerned, the appellant lived at 67 Bellevue Road, St George, Bristol from 17 June 2011 until 13 June 2017 at which time he had become resident at 5 Bellevue Terrace, Brislington, Bristol.

    5) The appellant's evidence, however, is that he moved from 67 Bellevue Road to St Pauls Road in March/April 2013. He then moved from St Pauls Road to Ground Floor Flat, 44 Arley Hill in March 2016 and from Arley Hill to Bellevue Terrace in March 2017 (all the aforesaid addresses are in Bristol and its surrounds).

    6) The appellant's tenancy agreement for the first floor flat, 38 St Pauls Road, Bristol was for six months commencing on the 4 April 2012, and was dated 23 March 2012.

    7) He received letters from HMRC's debt collection department before he moved from Arley Hill to Bellevue Terrace, whilst he was residing at Arley Hill, and those letters from the HMRC Debt Collectors were addressed to him at Arley Hill.

8) Following the demise of his initial business venture, the appellant started a new business (The Urban Standard) and at the same time appointed GW Jones & Co, chartered certified accountants, of Shirehampton, Bristol, to act as his agent. However, Mr Jones was instructed to act only as agent for the company and not as agent for the appellant, personally. So Mr Jones was not responsible for compiling and submitting the income tax returns for the appellant.

Burden and standard of proof

20. The initial onus of proof rests with HMRC to show that the penalties have been correctly imposed. If so established, the onus then rests with the appellant to demonstrate that there was a reasonable excuse for the late filing penalties or that there are special circumstances and HMRC's decision not to reduce the penalties because of those special circumstances was flawed.

Discussion

Appellant's grounds of appeal

21. The appellant appears to put forward the following grounds of appeal:

1) He received none of the notices, nor indeed the tax returns, which HMRC say they sent to him for the relevant periods.

2) The penalties are excessive in relation to the tax liability and the nature of the offence. They are completely and utterly disproportionate to the filing errors and the appellant has no liability to tax.

3) The appellant was under considerable financial and trading pressure which prevented him submitting his tax returns on time.

Respondent's submissions

22. In response, the respondents submit that:

1) The relevant notices were sent to the address that HMRC had on their system and it was the appellant's responsibility to ensure that HMRC's records were updated with any changes of address. There is no record of any of the mail being returned to HMRC as undelivered by The Post Office. An information sheet containing all the information about the penalties was sent to the appellant along with the relevant tax returns. The penalty regime is designed to ensure that taxpayers submit their returns on time irrespective of whether tax is due.

2) Pressures of work cannot be considered reasonable excuse given the length of time there is between the end of the tax year (and/or the date on which the appellant would have received notice to file a tax return), and the date on which the return should have been filed.

The paragraph 1 Schedule 55 issue

23. In order for Schedule 55 to be engaged, HMRC must show that the taxpayer has failed to make or deliver a return which, in the case of this appellant, is a return under Section 8(1)(a) TMA (see paragraphs 1(1) and 1(5) of Schedule 55).

24. The obligation on a taxpayer under Section 8(1)(a) TMA is to make and deliver a return to HMRC which contains certain prescribed information.

25. But more than that; the making or delivery is of a return which "may be required by notice given to him by an officer of the Board".

26. So there are three questions which we have asked ourselves in respect of this issue.

    1) Firstly, as a matter of law, if no notice to file is given to a taxpayer by HMRC, can Schedule 55 be engaged in respect of a return under Section 8(1)(a) TMA?

    2) If such a notice is required to be given, in the circumstances of this case was a notice to file ever sent to the appellant?

    3) Finally, in the circumstances of this case, was any such notice "given" to the appellant?

27. In relation to the second and third matters mentioned above, the former concerns the nature of any notice purportedly sent to the appellant and the latter concerns service of any such notice.

28. Taking these in turn:

29. Firstly, is Schedule 55 engaged if, in respect of a return under Section 8(1)(a) TMA no notice to deliver such a return is given to the appellant? In our view the answer is that Schedule 55 is not so engaged.

30. We say this for a number of reasons.

31. The first is that on the words of the statute, there is a clear link between a notice to be given to a taxpayer by HMRC, and the obligation on the taxpayer (in response thereto) to deliver a tax return to HMRC. The use of the word "may" in Section 8(1) has given us pause for thought. However, we do not believe that this means that HMRC have a discretion as to whether to serve such a notice on a taxpayer. Nor that there is also a residual or parallel regime which obliges a taxpayer to submit a return under Section 8(1)(a) even if HMRC have not given him a notice. ("May") simply means that if a taxpayer is given such a notice, he must file a return.

32. If Parliament had intended that the obligation to deliver a Section 8(1)(a) return was an absolute obligation, irrespective of whether HMRC had required a taxpayer to do so, there seems to be no reason why there should be any reference to a notice requirement at all.

33. It is of course the case that a taxpayer has an obligation to notify chargeability under Section 7 TMA. But any such notification is notification under Section 7 and is (obviously) not a return under Section 8(1)(a). And failure to notify under Section

7, whilst it might bring with it penalties of some sort, does not bring with it penalties under Schedule 55. There is no reference to Section 7 TMA in the table in paragraph 1(5)(b) of Schedule 55.

34. It is clear from Sections 8(3)-8(4B) that the notice under Section 8(1) is an important document.

35. It may require different information, accounts and statements for different periods or in relation to different descriptions of sources of income (Section 8(3)); it may require different information, accounts and statements in relation to different descriptions of person (Section 8(4)); and it requires particulars of any general earnings if a notice is given to a non-resident (Sections 8(4A) and 8(4B)).

36. In other words, the delivery of a return containing information under Section 8(1)(a) must contain the information which is requested by HMRC pursuant to a notice previously given to that taxpayer. And that notice identifies the information which that particular taxpayer may be required to provide in the return under Section 8(1)(a). In other words, they are two parts of the same process. The process is instigated by HMRC giving a notice to a taxpayer to make a return, such notice including the information which that return must include; and the taxpayer responding by making and delivering that return to HMRC.

37. Without the notice, the taxpayer is unable to make and deliver a return containing the information prescribed by HMRC because he has not received a notice prescribing that information.

38. What then is the position when a taxpayer is given no notice to file but still files a return. In those circumstances, can Schedule 55 apply? In our view no. Slightly oddly, if a taxpayer submits a return, notice for which he was never given, then the statutory pre-requisite for a return under Section 8(1)(a) is unfulfilled and thus Schedule 55 has nothing to bite on.

39. This may be a reasonably commonplace situation. Many individuals and their agents file electronic returns or download paper returns which are then filed through the post. And many will do so, spontaneously, knowing that they or their client has a source of income which needs to be returned. Having filed that return, we have no doubt that, if it is late, HMRC will impugn them under Schedule 55 for penalties.

40. But to get home on this, it is our view that HMRC must also prove that notice had been given to the taxpayer to deliver that return. Without such notice, then notwithstanding that a return has actually been filed, Schedule 55 cannot bite because any such return is not made pursuant to Section 8(1)(a). It has not been made in response to the requisite notice.

41. And in the context of this case, (even as this taxpayer frankly admits, he is aware that he had a responsibility to deliver a return), and (as will be seen later) his returns were subsequently filed, albeit late, we do not believe that this allows HMRC to visit penalties on him under Schedule 55 unless the return has been made pursuant to Section 8(1)(a).

42. We speculate that a notice to file is the same as a tax return. HMRC have not said so in this appeal. But the judge has downloaded a return from HMRC's website as

part of his review of this case to see whether it could assist. The return contains the words "This notice requires you by law to make a return of your taxable income….". So it does not seem too much of a leap of faith that a notice to file is indeed an integral part of a tax return.

43. But we do not think that simply using the words "This notice requires…." fulfils the requirements of Section 8(1).

44. In the first place, can downloading such a return from HMRC's website constitute "giving" by an officer of the Board?

45. Both Section 115 TMA and Section 7 of the Interpretation Act 1978, although not excluding other methods of service or giving, clearly contemplate a bipartite arrangement whereby HMRC will post or deliver a document to a specific taxpayer. They do not contemplate giving as including the publication of a pro forma which is then downloaded by taxpayers in general. The notice to file must be given to "him" i.e. the particular taxpayer. And it must be given by an officer of the Board. Downloading a document from a website, in our view, fulfils neither criteria.

46. Furthermore, what if a taxpayer is given a previously downloaded return from a friend? That taxpayer has had no interaction with HMRC. He has been given it by the friend and not by an officer of the Board. Can it really be said that in those circumstances the taxpayer has been given a notice to file by an officer of the Board simply because there are the words "This notice…." on the form itself? In our view it cannot.

47. HMRC have not in this case suggested that this "notice" on a tax return is a notice to file. Nor have they suggested that there is no need to prove service of a specific notice to file served on this particular taxpayer because of the notice in the return which the taxpayer must have seen by dint of the fact that, ultimately, his returns for the relevant periods have been submitted. They have (see below) adduced to what they consider to be evidence that notice to file was given on a certain date to this particular taxpayer. Clearly, there would be no need for them to adduce this evidence if they considered that the notification on the front of a tax return is sufficient to discharge the officer of the Board's obligation to give a notice to file to a particular taxpayer.

48. Furthermore, it is often the case (and it is certainly true in this case), that HMRC have included in the bundle what they say is evidence that a notice to file was given to the taxpayer. They do this by way of extracts from their computer records entitled Self-Assessment "Return Summary" where against the words "Return Issued Type" the words "Notice to File" are included. Then follow the dates on which the return issued was given, and was due (both in paper and electronic form) below which there is a Date of Receipt.

49. Whilst evidence of date of receipt is important as regards the particular case, it is our view that the details regarding the notice to file and the date the return is issued, would be largely irrelevant if HMRC considers they were not a necessary pre-requisite to visiting a penalty on the appellant under Schedule 55.

What did HMRC send to this appellant

50. As mentioned above, HMRC have submitted computerised records entitled Self-Assessment - Return Summary, for each of the years in question.

51. Miss Morgan has also provided a very helpful synopsis of the dates on which the returns should have been filed for the relevant years and the dates on which they were actually filed on the relevant years. But what Miss Morgan and those instructing her have not done (either in the bundle or in submissions) is to identify whether the notices to file mentioned in the aforesaid computer record extracts were in a form and contained the relevant information required by Section 8 TMA.

52. At this stage we are simply considering what HMRC may have sent to the taxpayer and we are not at all clear what it is. There is nothing which the respondents contend was the form of notice to file given to this particular taxpayer in respect of the years in question in the bundles (for example a blank or pro forma tax return or an example of a notice to file). As mentioned above we suspect that we are being asked to speculate that the two are the same.

53. Simply exhibiting a computer record on which the words “Notice to File" are included does not, in our view, discharge HMRC's evidential burden of establishing that a notice in the form required by Section 8 was sent (let alone given) to this particular taxpayer in respect of each of the four years in question in this appeal. It seems to us that HMRC, simply by including these computer record extracts, are asking us to speculate that what was sent to the appellant did comprise a notice in the form which complies with Section 8 TMA. But we are not prepared to so speculate. If HMRC had included a copy of a notice to file with the bundle, and asked us to speculate that a combination of the computer record and the document itself was sufficient to discharge their evidential burden, then we would have been more sympathetic. At least in those circumstances we would have been able to see the information on the notice to file and check that it did comply with Section 8.

54. But no such document was with the bundle, and we were asked to draw no such connection by HMRC either in the documents or in Miss Morgan’s submissions.

55. It is no answer, in our view, to say that the taxpayer must have received notice under Section 8, because he ended up (or someone on his behalf ended up) submitting returns late and those returns contained the wording mentioned in [42] above. For reasons mentioned above the completed return does not mean that a notice to file in a proper form, was given to a taxpayer. There is no correlation between the notices to file purportedly sent by HMRC, and the actual returns which HMRC received for this particular taxpayer. Indeed, those returns were not included in the bundle. It may be that returns have a unique reference number (not the taxpayer's unique reference number but the return’s unique reference number) so HMRC could if their systems allowed, marry up the tax return identity number of the notice to file, with the actual returns subsequently received by them. But in the absence of that, we can see no connection between the returns actually received by HMRC, and any notices to file given by HMRC ostensibly evidenced by their computer record extract.

56. And so it is our view that HMRC have not discharged the burden of establishing that a proper notice containing the information required by Section 8 TMA was sent to the taxpayer in respect of any of the years in question under this appeal. Since

the giving of such notices is a pre-requisite for the engagement of Schedule 55, it is our decision that the taxpayer's appeal must be allowed.

57. Although we have decided to allow the appeal for the reasons given above, other issues were argued before us. We deal with these comparatively briefly, below.

Given?

58. As mentioned at [26.3)], the third question that we have to decide is whether a notice under Section 8 was "given" to the appellant. If HMRC had established to our satisfaction (which they haven't) that they had sent a Section 8 notice to file to the taxpayer, the question is whether it has been given to that taxpayer. This is governed by Section 115(1) TMA and Section 7 of the Interpretation Act 1978, relevant extracts from both pieces of legislation being set out at [15] and [16] above.

59. As regards the burden of proof, it is for HMRC to establish that a Section 8 TMA compliant notice was sent in a properly addressed pre-paid envelope, to the appellant at his usual or last known place of residence.

60. If they can establish that, then the burden of proof shifts to the appellant to show (or to prove) "the contrary".

61. What the appellant has to prove, therefore, is not that he did not actually receive the notices (and we have found, as a question of fact, that he did not actually receive them). What he has to prove is that they were either not sent by HMRC in a properly stamped envelope addressed to his last known place of residence; or that they were never received at that last known place of residence.

62. This was always going to be difficult for the appellant and he has been unable to put forward any evidence as to whether or not the notices were actually received at 67 Bellevue Road.

63. HMRC's evidence that a notice to file was sent to the address at 67 Bellevue Road is the Self-Assessment Return Summary mentioned above, on which the Return Issue Date is identified in respect of each of the years in question in this appeal, combined with the computer record of the last known address of the appellant (namely 67 Bellevue Road).

64. We consider, on the basis of this evidence, and the presumption of regularity, that HMRC did indeed send what they considered to be notices to file, to that address, on the dates evidenced by the return summaries. And the appellant has been unable to provide any evidence or submissions to the contrary.

65. And so, if the matter were relevant, we would hold that the respondents did send the relevant documents to the last known place of residence of the appellant. They did so in a properly addressed envelope, there was no indication that they were not received (none of them were returned by the destination address) and the taxpayer has not proven to the contrary namely that the documents purportedly sent to that address were not so received.

Reasonable excuse

66. We do not believe that any of the appellant's grounds of appeal comprises a reasonable excuse within the parameters set out at [12] and [14] above. The fact that the appellant was under considerable financial and trading pressure does not comprise a reasonable excuse.

Special circumstances

67. Nor do we consider that the appellant's circumstances comprise special circumstances. HMRC have clearly considered special circumstances. We do not believe that there were any, and do not therefore believe that HMRC's decision that no special circumstances existed for the benefit of this appellant, is flawed.

Paragraph 4 penalties

68. As mentioned at [7] above, if HMRC are to visit daily penalties on an appellant, they must establish that they have given notice to the appellant specifying the date from which the penalty is payable, under paragraph 4(1)(c) of Schedule 55.

69. We have already decided on the evidence before us that HMRC have not established that a Section 8 compliant notice was given to the taxpayer. However, the evidence that they had given a paragraph 4(1)(c) compliant notice to the taxpayer is that a pro forma notice SA326D is included in the documents. HMRC have asked us to accept that this SA326D was the form of the notice sent to this particular taxpayer (it is a notice indicating to a taxpayer that he is liable to a fixed penalty of £100) and thus under Donaldson, does comprise adequate notice under paragraph 4(1)(c).

70. In Donaldson it was a combination of the SA326D and the original tax return which enabled the Court of Appeal to decide that proper notice under paragraph 4(1)(c) had been given. In this case of course we do not consider that HMRC have proved that they have given a tax return to the appellant. But on balance, if it was necessary to come to a conclusion on the paragraph 4(1)(c) notification issue, we would say that HMRC have discharged their burden of establishing that a proper notice under paragraph 4(1)(c) had been served on the taxpayer, and thus that pre-requisite for daily penalties has been satisfied.

Proportionality

71. It is the appellant's view that the penalties are excessive in relation to the tax liability and are disproportionate to the filing errors, especially given that the appellant has no liability to tax.

72. In deciding whether the penalties are disproportionate, the question is firstly whether the penalties are suitable or appropriate to achieve their relevant objective; secondly whether the penalties go beyond what is strictly necessary for the attainment of that objective.

73. In the context of penalties for late filing, the objective is to ensure, as HMRC have pointed out in their review letter, that a taxpayer completes his or her tax returns on a timely basis, and this is irrespective of whether there is any underlying liability to tax evidenced by those returns.

74. Law makers are given a wide remit to pursue this objective, and the courts should not interfere with that remit unless the penalty is "without reasonable foundation" or "not merely harsh but plainly unfair".

75. It has been held in a number of both direct and indirect cases that the penalty regimes are not themselves disproportionate, but they might be treated as being disproportionate in the circumstances of a particular taxpayer.

76. However, in this appellant's circumstances we do not believe that the penalties are disproportionate. It is clear from the legislation that the amount, if any, of tax owed by a taxpayer in respect of the relevant returns is not relevant to the penalties for late filing of those returns. The penalties are not tax geared, and are designed to promote timely filing. Penalties for late payment of tax is dealt with in another regime (Schedule 56 FA2009).

77. And so it is our view that the penalties visited on the appellant in this case are not disproportionate.

Decision

78. For the reasons given above we cancel the penalties visited on the appellant under paragraphs 3, 4 5, and 6 of Schedule 55 FA2009 and allow the appellant's appeal in respect of each of those penalties.

Conclusion

79. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 13 FEBRUARY 2018